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Nos. 81-2399 and 82-358

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN EDISON COMPANY, JERSEY CENTRAL POWER & LIGHT COMPANY and PENNSYLVANIA ELECTRIC COMPANY,
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
Respondents.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF ATOMIC INDUSTRIAL FORUM AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the National Environmental Policy Act requires a continuing reassessment of the environmental effects of operation of a nuclear power plant licensed by the Nuclear Regulatory Commission regardless of any proposal for further federal action by way of license amendment or otherwise.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Atomic Industrial Forum ("the Forum") respectfully requests leave to file *instanter* the attached brief *amicus curiae*. The interest of the Forum is as stated in the brief.

The Forum supports the position of Petitioners United States Nuclear Regulatory Commission and United States of America in No. 82-358 (hereinafter, "the Government"), and Petitioners Metropolitan Edison Company, Jersey Central Pow-

er & Light Company and Pennsylvania Electric Company in No. 81-2399 (hereinafter, "Private Petitioners"), that psychological distress (and accompanying physical symptoms) allegedly induced in persons living near nuclear power plants is not an environmental impact cognizable under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, (1976) ("NEPA"). This brief is not a repetition of arguments already put forth by Petitioners. Instead, the Forum wishes to bring the attention of this Court to another important question raised by the decision below which has not been tendered for review in the petitions for certiorari.

The court of appeals stated that, because of the Nuclear Regulatory Commission's continuing activities in regulating all nuclear power plants, the day-to-day operation of such plants constitutes proposed federal action subject to continual reassessment under NEPA. The court of appeals did not limit its discussion to Three Mile Island Unit 1 ("TMI-1"). This aspect of the court of appeals' decision adversely affects every nuclear power plant licensee in the country. If not corrected by this Court, it may well result in the NRC and nuclear power plant licensees diverting resources from performing safety and environmental reviews of new nuclear plants to conducting redundant environmental reviews of currently operating plants. At worst, the ruling implies that forty-year licenses issued only after incredibly exhaustive safety and environmental reviews may be revoked whenever the NRC, or a reviewing court, concludes that the NEPA cost/benefit balance no longer favors continued operation, or that preferable alternatives exist.

This issue is as important to the remainder of the electric utilities which build and operate nuclear power plants as the "psychological distress" issue raised by Petitioners.

Private Petitioners are, of course, members of the regulated nuclear industry and therefore might have been expected to tender for review the question of whether NEPA requires the continuous environmental reassessment of licensed nuclear power plants. However, in view of their urgent need to restart

the undamaged reactor at TMI-1 as promptly as possible, it is perhaps not surprising that Private Petitioners chose to concentrate their efforts on the immediate roadblock to such restart, which is the court of appeals' requirement with respect to the consideration of psychological distress. The Government indicates in its petition for certiorari that it would raise this issue "if free to do so," since the majority opinion below is irreconcilable with previous Supreme Court decisions interpreting NEPA. However, the Government, without waiving the question, does not tender it for review because in the Government's opinion "the result in this case probably does not turn upon its resolution." (Gov. Pet. at 17-18 n.12).[1] Adopting Judge Wilkey's view (Met. Ed. App. A at 50a), the Government suggests that the application of NEPA in this case could rest upon the narrow ground that the TMI-1 restart proceeding involves a proposal for major federal action, rather than the sweeping proposition that all licensed nuclear reactors are subject to continuing reassessment under NEPA.

The Forum agrees with the Government and Judge Wilkey that the application of NEPA in this case could rest on far narrower grounds than those articulated by the majority opinion. Certainly there is no doubt that this Court ought to reach the psychological distress issue raised by Private Petitioners and by the Government. Nevertheless, the overbroad, sweeping statements by the court of appeals concerning the need for continuing environmental reassessment of all nuclear power plants are so important that they ought not to be ignored. The Forum believes that its brief will assist the Court in considering an aspect of the court of appeals' decision which might otherwise escape review. For this reason leave to file the attached brief should be granted.

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[1] References to the petition for a writ of certiorari filed on behalf of the United States Nuclear Regulatory Commission and the United States are cited as "Gov. Pet. at ____". Citations to the decision below are to Appendix A to the petition for certiorari filed by Private Petitioners, which is cited as "Met. Ed. App. A."

The Forum was unable to secure the consent of the Respondent People Against Nuclear Energy to the filing of this brief. Counsel for Metropolitan Edison Company and the Solicitor General have granted their consent. The positions of the parties with respect to the Forum's submission of this brief are indicated in their letters filed with the Court.

Respectfully submitted,

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BRIEF OF THE ATOMIC INDUSTRIAL FORUM AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTEREST OF THE ATOMIC INDUSTRIAL FORUM

The Forum is an association of about six hundred domestic and overseas organizations involved in the peaceful uses of nuclear energy. The membership includes electric utilities, manufacturers, architect/engineer/construction firms, service organizations, consultants, uranium producers, radionuclide and radiopharmaceutical suppliers, financial institutions, universities, labor unions, government agencies and research labo-

ratories. One hundred and five of the Forum's 122 domestic electric operating utility members rely on, or plan in the future to rely on, nuclear power generation for at least a portion of their power needs.

The court of appeals' decision prejudices the interests of the Forum's members by its statements that the operation of nuclear power plants by those of the Forum's members who have previously been granted NRC operating licenses constitutes proposed federal action subject to continuing reassessment under NEPA. (Met. Ed. App. A at 18a-23a.) This ruling robs the NRC licensing process, upon which the Forum's members have relied in investing billions of dollars, of any finality. It implies that operating licenses issued for terms of up to forty years only after the exhaustive administrative review may be terminated at any time upon a finding by the NRC that the NEPA cost/benefit balance no longer favors continued operation or that there are environmentally preferable alternatives. Moreover, it is likely to divert NRC and industry resources from reviewing the safety and environmental impacts of new nuclear power plants to reassessing the environmental impacts of currently operating plants. This will prejudice the interests of many Forum members with nuclear power plants under construction, who thereby have a vital interest in the timely completion of the NRC licensing process.[1]

Finally, the interests of the Forum in this case are congruent with the national interest. Both Congress and the Executive Branch have determined that generation of electricity

[1] Current NRC estimates are that 10 reactors presently under construction will be ready to receive operating licenses in 1982, and 16 more will receive operating licenses in 1983. See letter from John F. Ahearne, Acting Chairman, NRC, to the Honorable Tom Bevill, Chairman, Subcommittee on Appropriations, House Committee on Appropriations (August 27, 1982) (enclosing monthly status reports as required by House Report 96-1093).

through nuclear power is important to national well-being and security, in that it helps reduce reliance on dwindling domestic resources and undependable foreign sources of oil and gas. The court of appeals' decision tends to frustrate that national policy by erecting needless roadblocks to the continued private development of nuclear power.

SUMMARY OF ARGUMENT

Before the decision of the court of appeals, the NRC's licensing decisions in issuing construction permits and operating licenses for nuclear power plants were the instances of proposed federal action which caused that agency to prepare environmental impact statements in conformity with the requirements of NEPA. That certainty in the licensing process has been seriously undermined by the decision of the court of appeals. The majority opinion asserts that the routine day to day operation of licensed nuclear power plants within the terms of licenses previously issued by the NRC imposes on that agency a continuing obligation to reassess the plants under NEPA even in the absence of any proposal for further federal licensing action. The scope of this language was expressly *not* limited to TMI-1. This decision, if uncorrected, is likely to inflict on utilities, the NRC, and federal courts the needless burden of preparing and reviewing endless, redundant environmental documents justifying licensing decisions which have already been made. NRC and industry resources are much better employed studying and improving the safety of operating plants, and reviewing the safety and environmental impacts of new plants.

Moreover, the court of appeals' decision is directly in conflict with the intent of Congress in adopting the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.* (1976). That Act encourages the peaceful development of nuclear power by, among other things, providing for the issuance of commercial

operating licenses for periods of up to 40 years. The court of appeals' decision, by making operating licenses issued to private parties subject to continuous federal environmental cost/benefit balancing, destroys the finality of the NRC licensing process. Thus, the court of appeals has undercut the incentive created by Congress to encourage the commercial development of nuclear power, contrary to the instructions of this Court in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-58 (1978).

REASONS WHY THE WRIT SHOULD BE GRANTED

The Forum strongly supports the arguments of Private Petitioners and the Government that the holding of the court of appeals that NEPA requires consideration of psychological distress in the Three Mile Island Unit 1 restart proceeding cannot logically be confined to that case.[2] An important and erroneous precedent has been set that under circumstances which the courts of appeals are apparently free to define, NEPA requires federal agencies to base their decisions on public anxiety itself, rather than on a careful (in this case, exhaustive) review of the underlying causes of such anxiety. This is likely to have a profound, distorting influence on federal decision-making with respect to nuclear power plants and other projects which may cause psychological stress in members of the public, such as the construction of jails, dams, and defense installations, and the sponsoring of controversial biomedical research.

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[2] This is true even though the NRC has recently taken steps to limit the consideration of "psychological distress" contentions in licensing proceedings other than TMI-1. See USNRC, Statement of Policy, 47 Fed. Reg. 31,762 (July 22, 1982). Absent effective reversal of the court of appeals' decision, such contentions will continue to be raised and continue to provide grounds for appeal from NRC licensing decisions.

The purpose of this *amicus curiae* brief, however, is to draw the attention of the Court to another important aspect of the court of appeals' decision not raised in the petitions for certiorari which, if left uncorrected, will have a significant adverse impact on the nuclear industry. This error provides an additional reason for granting the requested writ of certiorari.

A. The Court of Appeals' Ruling That NEPA Requires Continual Environmental Reassessment of Nuclear Power Plants Even After They Are Licensed Is Erroneous and Will Impose Significant Burdens on the NRC and the Industry It Regulates.

In the court below, the NRC argued that its decision whether to allow resumption of operations at TMI-1 was an enforcement action, rather than a licensing decision, and therefore was not a "major federal action" requiring compliance with NEPA. *See* 10 C.F.R. § 51.5(d) (1982); 40 C.F.R. § 1508.18(a) (1981). This argument was rejected by the court of appeals on the broadest conceivable ground. The court of appeals stated that the Commission's regulatory responsibilities with regard not only to TMI-1 but also to all other nuclear reactors are analogous to a more or less continuing agency decision to sustain an ongoing program that the agency has discretion to terminate at any time. (Met. Ed. App. A at 22a-23a.) According to the court of appeals, "[T]he extent of the Commission's statutory responsibilities over licensed nuclear facilities creates a continuing obligation to comply with NEPA." (Met. Ed. App. A at 19a). The effect of this statement will be to divert NRC and industry resources from assuring the safety of existing nuclear plants and conducting safety and environmental reviews of new nuclear plants to the needless preparation of redundant environmental documents for plants

which have already been licensed after thorough environmental scrutiny.[3]

Following the decision in *Calvert Cliffs' Coordinating Committee, Inc.* v. *U.S.A.E.C.*, 449 F.2d 1109 (D.C. Cir. 1971), the Atomic Energy Commission (the predecessor of the NRC) adopted the present rigorous and exhaustive approach to discharging that agency's obligations under NEPA. In order to obtain a construction permit for a proposed nuclear power plant, applicants must file an environmental report which surveys and evaluates a wide variety of environmental costs and benefits over the plant's 40-year life, together with a discussion of possible alternatives to the plant. *See* 10 C.F.R. § 51.20 (1982).[4] Based on this information and its own independent

[3] In a footnote, the Government in its petition for certiorari indicates that the majority opinion below with respect to continuing NEPA reassessment of nuclear power plants is erroneous and that, "if free to do so", it would tender the question for review. The Government states that it does not tender the question "only because the result in this case probably does not turn upon its resolution." The Government goes on to suggest that the question "may be dictum" and is not presented "in sharp focus." (Gov. Pet. at 17-18 n.12). Whether or not the result in the court of appeals turned on this issue, the language of the majority opinion clearly has unlimited potential to upset the NRC licensing process. Neither the majority nor the dissenting opinion saw fit to characterize the treatment of this issue as "dictum". This issue is too important to the continued development of the commercial nuclear power industry to be left uncorrected and in the legal limbo to which the Government has consigned it in its petition for writ of certiorari.

[4] According to USNRC, Regulatory Guide 4.2, Preparation of Environmental Reports for Nuclear Power Stations (Rev. 2 1976), an applicant's environmental report must address the purpose of the proposed facility and associated transmission facilities, the site and environmental interfaces (including geography, demography, ecology, meteorology, hydrology, geology, regional historic archaelogical, architectural, scenic, cultural and natural features, and noise), the

(Footnote continued on following page)

evaluations, the NRC Staff prepares a draft environmental statement which is distributed to other federal, state and local agencies and to the public for comment, following which a final environmental impact statement is prepared and distributed. 10 C.RF.R. § 51.24, 51.25, 51.26 (1982). A mandatory public adjudicatory hearing is then held, in which the draft and final environmental impact statements and any comments thereon are considered along with the application and the NRC Staff's safety evaluation. 42 U.S.C. § 2239(a) (1976). Interested persons have a right to intervene and participate in such hearings, by litigating any aspect of the safety or environmental impact of the proposed facility. *See generally* 10 C.F.R. Part 2, Appendix A (1982). If a construction permit is awarded, the utility then proceeds to build the plant at its own risk. *Power Reactor Development Corp.* v. *International Union of Electrical, Radio and Machine Workers,* 367 U.S. 396 (1961). These days, this reflects an investment of several billion dollars.

Before the utility can receive an operating license for the plant, it must again go through a safety and environmental review process similar to that described above. Another environmental report is required, draft and final environmental impact statements must again be prepared and circulated by the NRC Staff, and public adjudicatory hearings will again be held, if requested by any person whose interest may be affected by operation of the plant. *See* 42 U.S.C. § 2239(a) (1976); 10 C.F.R. §§ 51.21, 51.22-51.26 (1982). Even after issuance of a

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(Footnote continued from preceding page)

effects of station construction and operation (including radiological and non-radiological effluents), effluent monitoring, environmental effects of accidents, socioeconomic impacts, alternative energy sources and sites, station design alternatives, and a cost/benefit analysis. This guidance is substantially amplified by USNRC, NUREG 0555, Environmental Standard Review Plans for the Environmental Review of Construction Permit Applications for Nuclear Power Plants (May 1979). The environmental reports so produced are exhaustive multi-volume treatises.

40-year operating license, if an applicant proposes any changes to the facility which require license amendments,[5] the NRC will prepare at least an environmental assessment and may prepare an environmental impact statement, if the license amendment is likely to have a significant impact on the human environment or if, as a matter of discretion, it so chooses. *See* 10 C.F.R. §§ 51.5, 51.7 (1982); *Virginia Electric Power Company* (Surry Nuclear Power Station, Units 1 and 2), CLI-80-4, 11 N.R.C. 405 (1980) (preparation of an environmental impact statement on licensee's proposal to repair steam generators); *Commonwealth Edison Company* (Dresden Nuclear Power Station, Unit No. 1), DD-80-24, 11 N.R.C. 951 (1980) (discretionary preparation of environmental impact statement for proposed chemical cleaning). And there is again a right upon request by any interested person to a public adjudicatory hearing in which the safety and environmental impacts of the proposed action may be litigated.[6]

The most likely result of the court of appeals' decision will be to require the endless preparation of supplemental environmental impact statements. As Judge Wilkey, in dissent, points out, under the Council on Environmental Quality's regulations,

> Preparation of an EIS or a supplemental EIS is required only for proposed *actions.* Yet under the majority's interpretation, the NRC is engaged in such "action" every

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[5] Licensees can make some changes at nuclear power plants without prior NRC safety and environmental review, but only if such changes do not involve "unreviewed safety questions." *See* 10 C.F.R. § 50.59 (1982).

[6] If the proposed license amendment involves a significant hazard consideration, a hearing, if requested, must be held prior to issuance of the amendment. 42 U.S.C. § 2239(a) (1976). The Court of Appeals for the District of Columbia Circuit has held that a prior hearing must be held, if requested, even in cases which the NRC has determined do not involve "significant hazards considerations." *Sholly v. U.S. N.R.C.*, 651 F.2d 780 (D.C. Cir. 1980), *cert. granted*, 451 U.S. 1016 (May 26, 1981).

> second of every day. It thus will be possible for NEPA to apply even when a nuclear plant is operating pursuant to an NRC license and the NRC proposes to take no action to upset this status quo.

(Met. Ed. App. A at 49a) (emphasis in original). Specifically, the NRC and licensees will now be burdened with the need to prepare supplemental environmental impact statements whenever it is determined that there are significant new circumstances or information relevant to environmental concerns and bearing on the operation of an already licensed facility. 40 C.F.R. § 1502.9(c)(ii) (1981). In a footnote, the court of appeals opines that if no "substantial changes" occur and no "significant new circumstances or information relevant to environmental concerns" arise, the court of appeals' ruling will not significantly increase the NEPA burden on regulatory agencies in the future. (Met. Ed. App. A at 23a n.16). But new circumstances and information *always* arise following issuance of any operating license which could make the final environmental statement prepared at the operating license stage subject to supplementation.[7] For example, the relative costs and benefits of nuclear generation as typically set out in an NRC-prepared final environmental statement are dependent on comparisons of fuel costs and projections of electricity demand

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[7] Indeed, as this Court has pointed out in a similar context:

> "Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed] . . . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-55 (1978) (quoting *ICC* v. *Jersey City*, 322 U.S. 503, 514 (1944)).

which continually change. The alternatives against which continued operation must be evaluated under NEPA also change with time. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551-53 (1978).[8] The monitoring and study of nuclear power in this country and around the world annually produce volumes of new environmental and safety information, widely disseminated to the scientific community and the public, some of which can be regarded as altering the cost/benefit balance struck by the NRC when the construction permit or operating license was issued. And, of course, whenever a court discovers novel environmental impacts, such as "psychological distress" or "uncertainties",[9] this may create a need to supplement the environmental impact statement for every reactor licensed prior to the date of the court's decision.

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[8] Effective April 26, 1982, the NRC has adopted rules excluding consideration of need for power and alternative energy source issues in operating license proceedings. *See* 47 Fed. Reg. 12,940 *et seq.* (March 26, 1982) (amending 10 C.F.R. §§ 51.21, 51.23(e), 51.53). The NRC stated that these issues are considered thoroughly at the construction permit stage and experience has shown that repeated consideration at the operating license stage is unlikely to tip the NEPA cost/benefit analysis against issuance of an operating license for a plant which has already been completed. *Id.* This reasoning would also apply to preclude reconsideration of these issues in supplemental environmental impact statements. However, it is unknown whether this new rule will survive a "hard look" by the D.C. Circuit. (*See* Met. Ed. App. A at 26a and n.20; *Natural Resources Defense Council, Inc.* v. *NRC* (*Vermont Yankee III*, Nos. 74-1586, 77-1448, 79-2110, and 79-2131 (D.C. Cir. June 30, 1982) (Statement of Senior Circuit Judge Bazelon as to why he voted to deny rehearing)).

[9] *See Natural Resources Defense Council, Inc.* v. *NRC (Vermont Yankee III)*, Nos. 74-1586, 77-1448, 79-2110 and 79-2181 (D.C. Cir. April 27, 1982).

Even if the NRC determines that the alleged new circumstances or information do not require preparation of a supplemental environmental impact statement, the burden of justifying such decisions is likely to be significant. The court below suggests that the NRC must undertake "at least a preliminary investigation" to determine whether the claimed information or circumstances are new or significant, before it makes a decision not to prepare a supplemental environmental impact statement. (Met. Ed. App. A at 26a and n.20). And the results of this investigation must presumably be documented in a negative declaration and environmental assessment, or some other fashion to permit judicial review. *See* 10 C.F.R. § 51.7 (1982); 40 C.F.R. § 1508.9 (1981).

Critics of nuclear power will not hesitate to use the decision of the court below, which in this respect is not limited to TMI-1, to seek the preparation of additional environmental impact statements and further judicial review of the NRC's compliance with the strictures of NEPA. The NRC licensing process will thereby lose all semblance of finality.

B. The Court of Appeals' Ruling that the Issuance of an Operating License for a Nuclear Power Plant Is Subject to Continual Reconsideration Under NEPA Is Contrary to the Concept of Finality of Agency Action and to the Intent of Congress Expressed in the Atomic Energy Act.

The effect of the court of appeals' decision is to make operating licenses issued for periods of up to forty years terminable at will, based on continual federal environmental cost/benefit balancing. This is directly contrary to the intent of Congress in enacting Section 103(c) of the Atomic Energy Act of 1954, 42 U.S.C. § 2133(b) (1976), which authorizes the NRC to issue commercial operating licenses for a "specified period . . . not to exceed forty years."[10] This forty year period

[10] Congress did of course provide that operating licenses may be modified, suspended or revoked at any time for *safety* reasons. *See* 42 U.S.C. §§ 2236, 2237 (1976).

was chosen to provide a sufficient economic incentive to encourage utilities to build nuclear power plants.[11]

The court of appeals' decision offers minimal legal justification for destroying the finality contemplated by the Atomic Energy Act of 1954. As Judge Wilkey points out in his lucid dissent, NEPA applies only to proposals for major federal action. (Met. Ed. App. A at 49a). *See Weinberger* v. *Catholic Action of Hawaii*, ___ U.S. ___, 102 S.Ct. 197, 203 (1981); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 398-406 (1976); *Aberdeen & R.R. Co.* v. *SCRAP*, 422 U.S. 289, 320, 322 (1975). A utility's operation of a nuclear power plant within the terms of its license does not involve a *proposal* for federal action. The

[11] The first proposal in April, 1954 to amend the Atomic Energy Act of 1946 provided for a 25 year limitation on operating licenses. Joint Comm. on Atomic Energy, 83d Cong., 2d Sess., *A Proposed Act to Amend the Atomic Energy Act of 1946* 21 (Comm. Print April 1954), *reprinted in* 1 U.S.A.E.C., Legislative History of the Atomic Energy Act of 1954, at 81 (1955). However, in hearings held before the Joint Committee on Atomic Energy in May, 1954, a representative of interested public utilities testified that the need to finance and amortize nuclear facilities over a 25 year period would place an undue price burden on nuclear generated electricity in relation to electricity generated with conventional fuels. He encouraged Congress either to extend the operating license period to 40 years (the normal amortization period in the electric utility industry) or add a statutory provision which would allow utilities to "count absolutely" on renewal of their operating licenses after 25 years. *S. 3323 and H.R. 8862 to Amend the Atomic Energy Act of 1946: Hearings Before the Joint Committee on Atomic Energy*, 83d Cong., 2d Sess., 230-31 (1954) (Statement of E.H. Dixon), *reprinted in* 2 U.S.A.E.C., *Legislative History of the Atomic Energy Act of 1954*, at 1864-65 (1955). Apparently in response to this testimony, the Joint Committee amended the proposed bill to extend the maximum operating license period to 40 years. Joint Comm. on Atomic Energy, 83d Cong., 2d Sess., *Draft in Bill Form* 41 (Copm. Print May 21, 1954) *reprinted in* 1 U.S.A.E.C., *Legislative History of the Atomic Energy Act of 1954*, at 297 (1955). It was this latter proposal which became law on February 17, 1954. Atomic Energy Act of 1954, ch. 703, 68 Stat. 919 (1954).

licensee's operation of the plant, and the government's continuing safety oversight, were both included in the proposal which was reviewed and approved under NEPA when the operating license was issued; such operation no longer in theory or in fact constitutes a *proposal.*[12] Only if the utility requests an amendment to the operating license, or the NRC pursuant to its continuing safety oversight responsibilities seeks to impose additional requirements not in the license, is there a proposal for federal action within the meaning of NEPA. In that event review under NEPA is confined to the environmental impact of the proposal itself, rather than the environmental costs and benefits of continued operation of the nuclear power plant. *See, e.g. Portland General Electric Company* (Trojan Nuclear Plant), ALAB-531, 9 N.R.C. 263, 266 n.6 (1979).

In other contexts, the court of appeals has been willing to concede that

> [W]e cannot allow NEPA to be bloated, and indeed enfeebled, by pushing the logic of Section 102(2)(C) to ridiculous extremes. NEPA does not require an annual EIS on routine operation and maintenance of every program with significant environmental ramifications. Its rule of reason does not demand rethinking of everything all the time.

Sierra Club v. *Andrus,* 581 F.2d 895, 906 (D.C. Cir. 1978), *rev'd on other grounds,* 442 U.S. 347 (1979). But as Judge Wilkey has pointed out, where nuclear power is concerned, the court of appeals apparently believes there is no such thing as taking "too hard a look." *Natural Resources Defense Council,*

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[12] This distinction is similar to one made by this Court in *Andrus* v. *Sierra Club,* 442 U.S. 347 (1979). In that case the court of appeals had held that appropriations requests constitute "proposals for ... major Federal actions" under NEPA. This Court reversed, stating "[T]his interpretation distorts the language of the Act, since appropriation requests do not 'propose' federal actions at all; they instead fund actions already proposed." 442 U.S. at 361-62.

Inc. v. *NRC (Vermont Yankee III)*, Nos. 74-1586, 77-1448, 79-2110 and 79-2131, slip op. at 2 (D.C. Cir. April 27, 1982) (Wilkey, J. dissenting). The ruling of the court of appeals has deprived the NRC licensing process of any finality, and thus is likely to discourage continued private development of nuclear power. Even if the rewards are great, few will be willing to run the gauntlet if the gauntlet never ends.

CONCLUSION

Four years ago, the Supreme Court admonished the court of appeals that:

> Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action.

Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-58 (1978) (emphasis in original). There is nothing in the circumstances surrounding the proposed restart of TMI-1 which justifies the new roadblocks which the court of appeals has thrown in the path of resumed operation of TMI-1 and continued operation of other nuclear reactors. The court's decision represents an unwarranted departure from the ground rules laid down in *Vermont Yankee*. As Judge Wilkey stated:

> Congress knows everything that [the Court of Appeals for the D.C. Circuit] knows—and more—about the accident at TMI-2. When the standards by which the agency is to act under either NEPA or AEA are to be changed, Congress will determine in what direction and degree.

Met. Ed. App. A at 68a.

The court of appeals' decision should be summarily reversed. If, however, this Court believes summary reversal is inappropriate, then it should take up and consider the issue of whether all nuclear power plants must continually be subject to reassessment under NEPA, as well as the psychological distress issue raised by Petitioners.

Respectfully submitted,

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